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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1112

JAMES H. PRICE, *Petitioner,*

v.

STACEY W. COTTON, Trustee, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The judgment of the Court of Appeals for the Fifth Circuit affirming per curiam the judgment of the District Court is reported at 505 F.2d 732 (1974) and is set forth in the Appendix to the Petition at pp. A-2 and A-3. The opinion of the District Court, which in-

corporates the report of the bankruptcy judge and special master, is unreported; it is also set forth in the Appendix to the Petition beginning at p. A-3.

JURISDICTION

Petitioner has invoked the jurisdiction of this Court under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The Petition presents but a single question for review by this Court. That question is: Does rejection of a Chapter X reorganization plan by the stockholders preclude a court from confirming the plan where it has been accepted by the creditors and where the plan has been found by the court to provide adequate protection for the stockholders of the value of their equity?

STATUTES INVOLVED

Petitioner questions the construction which the courts below placed upon §§ 179, 216, 221 and 236 of Chapter X of the Bankruptcy Act, 11 U.S.C. 579, 616, 621 and 636. The entire text of Chapter X is set forth in the Appendix to the Petition; the aforementioned sections are to be found at pp. A-59 and A-60, A-66 through A-68, A-69 and A-72 respectively.

STATEMENT OF THE CASE

This litigation is the latest event in a long contest over the control of Atlanta International Raceway, Inc., a company which owns and operates an automobile racetrack outside Atlanta, Georgia. As a result of continuing financial difficulties, Atlanta International Raceway, in January 1971, filed a petition for reorganization under Chapter X of the Bankruptcy Act. In

February 1973, the trustee transmitted to the court two proposed plans of reorganization. One was based upon a proposal submitted by petitioner; this was later dismissed by the court at petitioner's request. The second plan was based upon a proposal submitted by the group that ultimately prevailed in the reorganization. As amended, this proposal became the basis for the plan filed by the trustee. (Petition, pp A-12, A-13 [1])

Based upon the report of the bankruptcy judge sitting as special master, the district judge found the trustee's plan, as amended, to be fair, equitable and feasible. (A-14) He ordered the trustee to submit the plan to a vote by the creditors and also by the shareholders, since the debtor had been found solvent. (A-14)

The results of the vote showed that the creditors, who among them held a total of approximately $1.8 million in liabilities, favored the plan by a better than two-thirds majority of each class of creditor. (A-15) However, the shareholders, holding an equity of some $320,000, rejected the plan. (A-15) Accordingly on August 30, 1973, the district court entered an order which, *inter alia,* granted the proponents of the trustee's amended plan an opportunity to file proposals designed to assure adequate protection for the shareholders in accordance with the requirements of section 216(8) of the Bankruptcy Act.[2] (A-15, A-16) Thereupon the proponents

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[1] References in the text to the Appendix to the Petition are hereinafter cited by page number alone, as, e.g., A-12.

[2] Section 216(8) provides:

> Sec. 216. A plan of reorganization under this chapter—
> . . .
>
> (8) shall provide for any class of stockholders which is affected by the plan and does not accept the plan by the ma-

of the trustee's plan offered to pay $1.60 per share to any stockholder who did not wish to retain an equity in the reorganized company, with the further understanding that no stockholder would be required to sell his stock. (A-36)

The special master having found that the approximate value of the company's stock was $1.00 per share,[3] concluded that the $1.60 offer was "more than adequate protection under Section 216(8) of the Act." (A-39)

Petitioner and others objected to the special master's report on the single ground that § 216(8) did not apply to a corporation with only one class of shareholders. No objections were made or errors alleged with respect to any of the findings of fact made by the special master.

The district judge rejected the construction of § 216 (8) suggested by the petitioner, approved and adopted the report of the special master, and ordered the trustee's amended plan confirmed. (A-8, A-9) He specifically found that the plan complied with article X of Chapter X (§ 216 of the Act) and that it was fair, equitable and feasible. (A-5)

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jority of the stock required under this chapter, adequate protection for the realization by them of the value of their equity, if any, in the property of the debtor dealt with by the plan, either as provided in the plan or in the order confirming the plan, (a) by the sale of such property at not less than a fair upset price; or (b) by appraisal and payment in cash of the value of their stock; or (c) by such method as will, under and consistent with the circumstances of the particular case, equitably and fairly provide such protection: *Provided, however*, That such protection shall not be required if the judge shall determine that the debtor is insolvent;

[3] The valuation of $1 per share was based upon an appraisal ordered by the court and upon the calculations of the Securities and Exchange Commission. (A-38)

Petitioner appealed to the Court of Appeals for the Fifth Circuit which affirmed the decision of the District Court per curiam.[4] (A-1)

ARGUMENT

In support of his request for certiorari, petitioner argues that the decisions of the courts below are erroneous. He asserts that the question presented to this Court for review is an important one of first impression in the administration of the Bankruptcy Act, meriting the attention of this Court. It is respondent's view that the decisions below are clearly correct and that the denial of certiorari in this case would leave no one, except possibly the petitioner, in any doubt as to whether a reorganization plan which has been accepted by the requisite number of creditors and which provides adequate protection for the stockholders can be confirmed without the majority approval of the stockholders.

Section 179 of the Act provides that in order for a proposed plan to be considered by the court for confirmation it must first have been accepted by two-thirds of each class of creditor. If the debtor is solvent, it must also be accepted by stockholders holding a

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[4] The affirmance was pursuant to the Fifth Circuit's Local Rule 21 which provides:

> When the court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the court for decision: (1) that a judgment of the district court is based on findings of fact which are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) *that no error of law appears; and the court also determines that an opinion would have no precedential value,* the judgment or order may be affirmed or enforced without opinion. (Emphasis supplied.)

majority of the shares. However, § 179 excludes from those whose acceptance must be obtained several categories of creditors and stockholders, specifically: (1) those who are not affected by the plan; (2) those whose claims or stock are disqualified under the Act; or (3) those "for whom payment or protection has been provided as prescribed in paragraphs (7) and (8) of section 216 of this Act." [5]

Section 216 prescribes the provisions which must be included in any reorganization plan. Paragraph (8), which is directly involved in the present case, specifically deals with the situation in which a plan does not receive majority acceptance of the stockholders. It requires in those circumstances that the plan or the confirmation order provide "adequate protection for the realization by them of the value of their equity, . . ." The statute then goes on to specify the manner in which the requirement of "adequate protection" may be met, including "appraisal and payment in cash of the value of their stock."

Paragraph (7), which is not directly involved in the present case, deals with a situation in which a plan is not accepted by the requisite two-thirds majority of creditors. It prescribes in language parallel to that contained in paragraph (8) the manner in which nonassenting creditors are to be protected.[6]

In sum, Chapter X contains clear and well-defined exceptions to the general rule requiring acceptance of a reorganization plan by at least two-thirds of the creditors and, where the debtor is solvent, by stockholders

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[5] For text of § 179, see Petition, pp. A-59 and A-60.

[6] For text of § 216(7) and (8), see Petition, pp. A-66 and A-67.

holding a majority of the shares. One of those specific exceptions is for the case in which stockholders are to receive payment for the value of their stock. That is what was proposed in the present case and that is what was upheld by the courts below.

Petitioner contests this result, arguing that since there was no acceptance of the plan by the shareholders, the court was powerless to confirm it. Petitioner builds his statutory argument upon a unique application of § 236 of the Act. Section 236 appears in article XII—the article governing dismissals and adjudications. Section 236 provides for dismissing a Chapter X petition or adjudicating the debtor a bankrupt where the reorganization proceeding has collapsed at any one of a number of points including where "no plan approved by the judge is accepted."[7] Since no plan had been accepted by the stockholders in the present case, petitioner argues that the court below was in error in confirming the plan even though provisions had been made for adequate protection of the stockholders.

In his eagerness to find a statutory peg on which to hang this peculiar view of Chapter X procedures, petitioner apparently overlooks the preceding article. Article XI deals with confirmation and consummation of the plan. Section 221 of that article provides that "the judge shall confirm a plan if satisfied that

> (1). the provisions of article VII, section 199, and article X of this chapter have been complied with;
> . . . ."[8]

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[7] For text of § 236, see Petition, p. A-72.

[8] For text of § 221, see Petition, p. A-69.

Article VII sets forth the proceedings subsequent to approval of the petition by the court, including the prerequisites for holding a confirmation hearing, contained in § 179. Section 199 deals with claims of the United States and is not in issue here. Article X contains § 216(7) and (8) with their provisions for "adequate protection" of creditors and stockholders in lieu of majority acceptance of a plan.

Thus, the Act clearly contemplates and provides for confirmation—not dismissal or adjudication—even though a plan has not been accepted by the requisite number of shareholders or creditors—provided that the nonassenting creditors or shareholders have been given the "adequate protection" prescribed by the Act. In short, it is clear that one does not even reach the question of dismissal or adjudication dealt with in § 236 where a plan complies with the "adequate protection" provisions of § 216(7) and (8).

In his attempt to reconcile the provisions of § 216(8) with the argument that § 236 requires dismissal or adjudication in the absence of acceptance by the shareholders, petitioner implies that the provisions of § 216 (8) were intended to apply only where there is more than one class of stockholders and at least one class has accepted the plan. Petition, pp. 7-8. Under this interpretation, § 216(8) of the Act could not apply to a vast number of corporations which have only one class of stockholders.

Petitioner made this argument fully before the courts below. It was disposed of by the District Court as follows:

> The Court does not agree. Clearly, Debtor is a corporation which is entitled to relief under the

> provisions of Chapter X. This, in the Court's opinion, would include the provisions of § 216(8). The Court feels that if Congress had intended that the provisions of § 216(8) would not apply to corporations with only *one* class of shareholders, it would have so provided. Since there is no such provision, the Court is satisfied the framers of the Act intended that § 216(8) would apply to all corporations eligible for relief under Chapter X of the Act.

While petitioner's interpretation of § 216 denying its application to companies having only one class of shareholders may be helpful to him in justifying his peculiar construction of § 236, the result achieved underscores the fallacy of his position. Under petitioner's view of Chapter X, a plan may not be confirmed if the corporation has one class of stock and a majority of it reject the plan. But a plan may be confirmed if the corporation has two classes of stock and the shareholders of one class reject the plan, whereas those of the other class vote in favor of it. Clearly, neither the language of the statute nor any considerations of public policy can justify making such a distinction.

Petitioner goes beyond arguing from the language of the statute; he purports to find support for the result he seeks in the intentions of Congress as well. Thus he argues that it was the "clear intent [of Congress] to give stockholders the *right* to reject a plan of reorganization when they have an equity interest in the corporation." Petition, p. 7. And further he argues that it was not the intention of Congress to "force a plan on unwilling creditors and stockholders." *Ibid.* Yet nowhere in the Petition is there a single reference to a committee report, Congressional hearing, floor debate or other such source of legislative intent to support these contentions.

Indeed, the legislative history of the "adequate protection" provisions contained in § 216(7) and (8) is entirely to the contrary. It is clear from both Senate and House documents that these provisions were meant to be substantially the same as those found in paragraphs (b)(4) and (5) of old § 77B,[9] which until the enactment of the present Bankruptcy Act in 1938 governed corporate reorganizations. S. Rep. No. 1916, 75th Cong., 3d Sess. 34 (1938); Analysis of H.R. 12889 Prepared by National Bankruptcy Conference for the House Committee on the Judiciary, 74th Cong., 2d Sess. 70-72 (Comm. Print 1936). Paragraphs (4) and (5) of § 77B(b) were intended by Congress to permit confirmation of a plan in the face of its rejection by the shareholders provided the plan gave adequate protection for their interests. The report of the House Committee on the Judiciary on H.R. 5884, the bill which became § 77B, states:

> A plan shall not be confirmed until it has been accepted in writing by creditors holding two thirds in amount of the claims of each class whose claims have been allowed and would be affected by the plan and by stockholders holding a majority of the stock of each class. Such consent on the part of creditors is not required if their claims are not affected or if the plan makes provision for the payment of their claims in cash in full, or for their protection in the manner provided in subdivision (b) of clause (5). Reference will be made later to the protection required. Such acceptance is not required on the part of any stockholder or class of stockholders if the judge shall determine either that the debtor is insolvent or that the interests of such stockholder or stockholders will not be af-

[9] Act of June 7, 1934, ch. 424, 48 Stat. 912.

> fected by the plan or if provision is made for the protection of the interests of such stockholder or class of stockholders in the manner provided in subdivision (b) clause (4). Adequate provision is made in clauses (4) and (5) of subdivision (b) for the protection of such stockholders and creditors whose acceptances are not required. H. Rep. No. 194, 73d Cong., 1st Sess., 5-6 (1933).

See 3 *Gerdes on Corporate Reorganizations,* 1272-74 (1936).

Chapter X of the 1938 Act was enacted only four years after § 77B had become law and Congress was well aware that the new Chapter X would continue to authorize confirmation of a plan over majority objections. Thus, the report of the Senate Committee on the Judiciary accompanying H.R. 8046, the bill which became the present Bankruptcy Act, stated:

> Subsection (7) of section 216, derived from section 77B(b)(5), makes provision for the treatment of any class of creditors affected by a plan where two-thirds of such class fail to accept the plan. In such event a plan must provide adequate protection for the realization of the value of such creditors' claims, either by transfer or sale, or retention by the debtor, subject to such claims, of the property dealt with by the plan and affected by such claims, or by a sale of such property free of claims at not less than a fair upset price, or by the appraisal and payment in cash of the value of such claims, or, finally, by any method that will equitably and fairly provide adequate protection for the realization of such value.
>
> Subsection (8) of section 216, derived from section 77B(b)(4), is concerned with the protection of the interests of nonassenting classes of stockholders. The value of their equity, if any, is to be

> protected through a sale of the debtor's property at not less than a fair upset price, or by appraisal and payment in cash of the value of their stock, or by any other fair and equitable method. Insolvency of the debtor, however, makes any provision for stockholders unnecessary. S. Rep. No. 1916, 75th Cong., 3d Sess. 34 (1938).

Against this legislative history, it is difficult to see how it can be said that Congress intended that a plan could not be confirmed without majority acceptance by the shareholders. It is equally difficult to find any basis for petitioner's view that Congress intended § 216(8) to apply only where a corporation has only one class of shareholders.

Nevertheless petitioner insists that there is uncertainty which this Court should resolve because the precise question presented in this case has not been squarely ruled upon by the courts. As the Securities and Exchange Commission commented in this case before the Fifth Circuit, "this dearth of decisions results from the fact that it has been universally assumed that a challenge such as that made by appellant is wholly without merit." Brief for the SEC, p. 14.

Neither of the two leading bankruptcy treatises shares petitioner's doubts. *Collier* states:

> These . . . provisions set forth ways by which the rights of creditors or stockholders, or classes of them, may be disposed of *in invitum* so that their acceptances of the plan are unnecessary, providing, of course, that the plan is fair, equitable and feasible. In this connection, it should be pointed out that the Act, by affording methods other than acceptance which may be used to dispose of claims for the purposes of confirmation of a plan, thereby provides a means through which a dissenting

> *majority* of a class or classes of claimants may nevertheless be bound by a fair, equitable and feasible plan. 6 *Collier on Bankruptcy* (14th ed., 1973 rev.) 1295-96.

Similarly, *Remington* states:

> Section 216(7) and (8) make it mandatory for plans to make provision for the adequate protection of nonaccepting classes of creditors and stockholders who are affected by the plan. *Remington on Bankruptcy,* § 4596-97 (1961 rev.).

Although there appear to be no reported decisions, other than the present case, construing the provisions of § 216(8), petitioner states in his Petition that he has been able to find one case "involving a similar construction problem", *In re Granville & Winthrop Bldg. Corp.,* 87 F.2d 101 (7th Cir. 1936), *cert. denied sub nom., Keig* v. *Lloyd,* 301 U.S. 702 (1937). That case involved the predecessor provisions of § 216(7) in § 77B, relating to creditors. There the Court of Appeals reversed the order of the District Court confirming a reorganization plan on the ground that the protection afforded to the rights of nonassenting creditors was inadequate. *Id.* at 103. The case does not stand for the proposition, as petitioner implies, that the court has no authority to confirm a plan without its acceptance by the creditors even where the adequate protection requirements are met. The language quoted by the petitioner at p. 8 of the Petition deals rather with the much more limited question of the construction to be placed upon one of the several alternative provisions governing the *form* of protection to be afforded. The provision involved in *Granville* permits any form of protection which the court considers equitable. The protection afforded in the present case is appraisal and

cash payment. Accordingly it is inconceivable that *Granville* can be stretched to constitute an adverse precedent as to any aspect of the present case. Indeed *Granville* is one of a long line of cases applying the parallel language of the creditor provisions of § 216(7) and its predecessor provisions in § 77B which proceeds on the assumption that a plan may be confirmed even though it has not received the requisite two-thirds acceptance of the creditors. The issue in these cases is whether the protection afforded by the plan is adequate —a question which would not have arisen if we accept petitioner's theory that a plan may not be imposed upon nonassenting creditors and shareholders. See, e.g., *White* v. *Penelas Mining Co.*, 105 F.2d 726, 729 (9th Cir. 1939); *Texas Hotel Securities Corp.* v. *Waco Development Co.*, 87 F.2d 395, 400-01 (5th Cir. 1936), *cert. denied sub nom. Waco Development Co.* v. *Rupe*, 300 U.S. 679 (1937); *In re Murel Holding Corp.*, 75 F.2d 941, 942 (2d Cir. 1935).

Finally we would respectfully call to the attention of the Court the decision in *Country Life Apartments* v. *Buckley*, 145 F.2d 935 (2d Cir. 1944). In that case the Court of Appeals for the Second Circuit rejected appellants' argument that the reorganization plan should not have been confirmed because it lacked the assent of a two-thirds majority of any class of creditors, stating:

> Under Bankruptcy Act, § 179, no acceptance need be obtained from a class of creditors or stockholders 'for whom payment or protection has been provided as prescribed in' § 216 (7, 8). *Id.* at 938.

We respectfully submit that the plain meaning of words, the legislative history of the statutory provisions, the decisions of the courts and the complete ac-

cord of the leading bankruptcy treatises permit of no other decision than that reached by the courts below. Further there are no contrary decisions which would give rise either to a conflict among the circuits or to uncertainty as to the meaning of the law. This case simply does not present an important issue in the administration of the federal bankruptcy statute which merits review by this Court.

CONCLUSION

For the foregoing reasons we ask that the Petition for Certiorari be denied.

Respectfully submitted,

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Counsel for Respondent